IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1373

Charles L. Meyer, Petitioner

V

The United States of America

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Charles L. Meyer, Petitioner
355 Pinewood Lane
San Antonio, Texas 78216
Area Code 512 telephone no. 828-1913

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OPINIONS BELOW

The opinion of the US Court of Claims file no. 182-75 is printed as appendix A to this petition on page 17.

JURISDICTION

The judgement of the US Court of Claims file no. 182-75 was entered on November 12, 1976. A timely petition for rehearing was denied on January 7, 1977. The jurisdiction of the Supreme Court is invoked under 28 U.S.C., Supreme Court rules, Section 1255 (1).

QUESTION PRESENTED

The legal action being appealed from the US Court of Claims was dismissed by a court order which did not rule on two questions of constitutionality, did not rule on seven different legal issues, and dismissed the legal action based upon an incomplete court file. The plaintiff questions whether this court action is justice. The plaintiff seeks a decision based upon all legal issues which were presented.

STATUTES INVOLVED

All public laws and Armed Service written directives are specified in appendices to this petition.

INCORRECT CORRECTION BOARD PROCEDURES, INCOMPLETE US COURT OF CLAIMS CONSIDERATION, QUESTION OF CONSTITUTIONALITY.

The plaintiff submitted an application for correction of his records to the major command Headquarters (HQ) in accordance with Air Force Regulation (AFR) 31-11 in October, 1969. A negative decision was announced on April 1, 1970.

a. Two administrative errors exist in the staffing of the above action.

(1) On February 18, 1970 the contents of AFR 31-11 were revised. The Air Force major command HQ correction board in its negative decision refused to apply criteria which was placed into effect by the newly revised written directive.

(2) Air Force administrative procedure requires completion of the staffing of a records correction application at a major command HQ took over five months to complete the staffing of this action. During this time the plaintiff with uncorrected records was considered for promotion the second time and was not selected for promotion.

(a) The legal issue here is the inconsistency of treatment in the staffing of the plaintiff's records correction. The US Air Force in later years corrected this situation by revising AFR 31-11. All records correction applications continue to be submitted through the applicant's major command HQ. The correction board is now conducted for all records correction applications at the Military Personnel Center, Randolph AFB, Texas which is HQ US Air Force level. All records correction applications now receive the same treatment by this Air Force departmental level correction board. This administrative remedy does not correct the plaintiff's situation. The plaintiff submits that by "sitting" on his records correction application for over five months this procedure is arbitrary and constitutes a discriminatory act. Plaintiff questions this procedure as being in violation of the fourteenth article of the US Con-

stitution which prohibits discriminatory acts.

The plaintiff submitted his application for correction of his records to the Air Force Board for Correction of Records (AFBCMR) in accordance with AFR 31-3 in June, 1970. This application was denied in June, 1971.

a. The only subjective reasons for the negative decision which the plaintiff has identified are specified below.

(1) The plaintiff attached written statements to his records correction application from individuals who were not his reporting official. The AFBCMR refused to accept written statements from individuals other than the applicant's reporting official. This restriction upon who can submit written statements to support the applicant's records correction application does not exist in AFR 31-11. This written directive, revised on February 18, 1970, permits written statements to be submitted by the applicant's reporting official or other individuals who are knowledgeable of the facts and circumstances. The plaintiff attached statements from individuals who were outside of his chain of command but who meet the criteria of the second condition specified in the revised written directive.

(2) Precident exists to correct the records and implement a retroactive promotion in grade for officers serving on EAD. This subject matter is presented in detail in the plaintiff's petition filed on June 2, 1975, paragraph 11d (2), pages 10 and 11. The AFBCMR did not want to establish a new precident for correcting the records of a non-EAD active reservist pertaining to promotion when this procedure had never previously been done before. Plaintiff cited the following two legal precidents for non-EAD active reservists seeking relief in Federal courts to refute the Air Force contention of not extending applicability of its written directives to members of the non-EAD active reserve component.

(a) Geller v. The Secretaries of Defense and the Air Force, US District Court for the District of Columbia, file no. 74-1843, filed December 18, 1974, ruling dated July, 1976.

(b) Novak v. Captain Talbot, USN, et al., US District Court of Northern Illinois Eastern Division, file no. 72C 1559, ruling dated October 19, 1972.

The legal issue here is that the US Air Force deviated from the written directives in effect in order to deny the plaintiff's application for correction of his records. The plaintiff cited legal precidents which require an Armed Service to follow its own regulations.

The US Court of Claims ruling dated November 12, 1976 states that the plaintiff did not submit cogent or clearly convincing evidence that the AFBCMR decision was arbitrary or capricious. The plaintiff answers this decision as follows:

a. Reproduced copies of the plaintiff's Officer Effectiveness Reports (OERs) have been presented to the court.

b. The plaintiff has presented cited portions of the applicable written directives in effect at the time.

c. The presiding judges were required to (i) read the plaintiff's OERs, (ii) read the applicable written directives for the preparation of these OERs, and (iii) ascertain whether the plaintiff's OERs are or are not prepared in compliance with these written directives. The plaintiff believes that such a review will ascertain that his OERs were prepared contrary to the written directive for their preparation. AFR 31-11 dated February 18, 1970 paragraph 5b(2)(b) requires a correction board to invalidate an applicant's OERs when the applicant proves noncompliance with the written directive for their preparation.

d. The US Court of Claims order dated November 12, 1976 does not indicate that an administrative review of these documents identified in sub-paragraph d above was made.

e. The plaintiff is unable to present more compelling evidence that presentation of the above facts, written directives, and applicable records. A review of all of these documents is required in order to ascertain if the plaintiff's

OERs are or are not prepared in accordance with the applicable written directives. If the plaintiff's OERs are to be invalidated, the plaintiff is entitled to retroactive promotions is grade, reinstatement in the US Air Force reserve to the date of the court ruling, and compensation of pay and allowances from August, 1971 until the date of the court ruling.

LEGAL ISSUES NOT RULED UPON BY THE US COURT OF CLAIMS

The legal issues described below were not ruled upon by the US Court of Claims.

a. The plaintiff's petition filed June 2, 1975, page 11, paragraph 11b, questions the lack of a hearing before the AFBCMR as being a lack of due process. This legal issue was clarified and presented in the plaintiff's petition filed in August, 1976 as a violation of the due process fifth article of the US Constitution. The US Court of Claims in its order dated November 12, 1976 ruled only that the lack of a hearing was not arbitrary; it did not rule on the question of constitutionality. Plaintiff cited O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, (1969). This cited legal precident requires the US Court of Claims to rule on this question of constitutionality.

(1) Alternative legal issue. The plaintiff's petition filed in August, 1976 cites Newman v. U.S., 1968, 185 Ct. C1. 269, which establishes a legal precident for requiring a BCMR hearing when "the procedures of the lower boards were so defective as to preclude reliance on their advice." The plaintiff should have received a hearing because of the many procedural errors committed by his command headquarters correction board. The US Court of Claims did not rule on this alternative legal issue.

b. The plaintiff's notarized affidavit dated May 13, 1975 presents the concept of an implied contract which was violated. The plaintiff received training to become a US Air Force commissioned officer and through an administrative error by the Air Force did not serve on EAD. The plaintiff contends that he should have served as a commissioned officer for 20 years of EAD. The Government's attorney answered this concept by citing precidents the essence of which is that an officer does not have a contract to serve on EAD. The plaintiff replied to the Government's position by citing the several US Navy BCMR decisions pertaining to Chief Warrant Officer Carl Buck. These US Navy BCMR decisions constitute a military precident which provided for an examination of the individual's service record by a responsible individual, exclud-

ing the records in question, and a favorable decision by this responsible individual which corrects the record of the individual for the issue in question (i.e., retroactive promotion of a commissioned officer). The US Court of Claims did not rule on this matter.

c. The plaintiff pursued a legal remedy in other Federal courts. Other Federal courts dismissed the plaintiff's legal action with a lack of jurisdiction ruling. The plaintiff's legal action presents information that the desired corrective action is found in AFBCMR administrative procedures instead of in Air Force written directives. Other Federal courts which considered the plaintiff's previous legal actions committed an administrative error in their lack of jurisdiction rulings. The plaintiff requested reimbursement of the court and legal cost of his previous legal actions. The Government's attorney stated that there is no statute under which the plaintiff can be reimbursed for these costs. The plaintiff presented reimbursement of these costs as a claim of equity against the US Government. The US Court of Claims did not rule on this matter.

d. The plaintiff filed motions under US Court of Claims rule no. 74 to secure copies of a US Air Force and US Navy BCMR decisions which were dated prior to the enactment of the Federal Privacy Act and the Freedom of Information Act. The plaintiff asked that if these Armed Services correction board decisions were published in the Federal Register then they were accessable as public records. The US Court of Claims did not rule on this matter.

e. In an attempt to substantiate bias by the reporting official towards him as a minority group member the plaintiff in his petition filed in August, 1976 filed a motion under US Court of Claims rule no. 74 to supoena the OERs of the other officers rated by the same reporting official. The issue here is that the plaintiff's reporting official consistently rated non-minority group members higher than he rated the plaintiff who is a minority group member. The US Court of Claims did not rule on this motion. In presenting facts for this legal issue the plaintiff cited two precidents the essence of which prohibit discriminatory personnel practices. The plaintiff contends that his reporting official's bias towards minority group members caused him to give the plaintiff lower ratings in his OERs than he gave other officers on their OERs. The plaintiff contends that this discriminatory practice is contrary to the fourteenth article of the US constitution which prohibits discriminatory acts. The US Court of Claims did not rule on this matter.

(1) It should be noted that the plaintiff's reporting official has resided since the early 1960s in the municipality of Arlington Heights, Illinois. It should be further noted that in January, 1977 that the US Supreme Court ruled that this municipality was not required to change its zoning laws to permit public housing to be constructed so that minority group members could reside in public housing in this municipality.

f. The written directives for the US Air Force and the US Army BCMR, reference, AFR 31-3 and Army Regulation 15-185, both specify that the civilian secretary correction board will decide when to invite the applicant for a hearing. The plaintiff's former associate legal counsel in his previous legal actions is a US Naval Reserve retired officer. This individual informed the plaintiff that the written directive for the US Navy BCMR specifies that the applicant will be given a hearing before this board. The plaintiff questioned how can the same public law which authorizes an Armed Service civilian secretary correction board, 10 US Code Section 1552, be interpreted in different ways by different Armed Services and requested the US Court of Claims to issue a ruling to resolve this inconsistency of treatment by the different Armed Services. The US Court of Claims did not rule on this matter.

g. The plaintiff stated in his legal action before the US Court of Claims that his legal action was unique, no legal precident could be located which covered all of the legal issues involved and requested the court to rule on each and every legal issue presented. The US Court of Claims did not rule on each and every legal issue presented.

INCOMPLETENESS OF COURT FILE AT TIME OF COURT ORDER DATED NOVEMBER 12, 1976

In September, 1976 the plaintiff conferred by telephone with Mr. Frank Peartree, the US Court of Claims Court Clerk. Mr. Peartree informed the plaintiff that he was sending the court file to the court for trial. On September 27, 1976 the plaintiff filed a motion for leave to file a supplemental memorandum based upon the incompleteness of the case file. The US Court of Claims denied the plaintiff's motion on October 1, 1976 and on November 12, 1976 dismissed the plaintiff's legal action.

The plaintiff filed a petition for rehearing in November, 1976. The basis for this petition is as follows:

a. The Government's brief filed September 20, 1976 presented new legal issues which had not previously been presented. The US Court of Claims rule no. 103c(2) specifies that there must be a filing of a stipulation of the parties or a pretrial memorandum to specify that the court file contains all the material facts. This procedure was not done.

b. The Government's attorney made several inaccurate statements about the plaintiff. The plaintiff wrote to the US Court of Claims Court Clerk, stated the inaccurate statements and requested this information to be communicated to the court. The court clerk refused to do this and returned this letter to the plaintiff. The plaintiff's letter which was not accepted by the court clerk is attached to his motion for rehearing which was filed in November, 1976. The plaintiff contends that the court clerk was exercising his own personal judgment. Action should have been taken in accordance with US Court of Claims rule no. 13(e) pertaining to misconduct by the court clerk.

Of particular interest is the Plaintiff's Response to Defendant's Response to Plaintiff's Motion For Rehearing which was filed September 20, 1976. The first sentence of this brief specifies: "The Defendant's brief filed September 20, 1976 introduces the following new legal issues:" Five sub-paragraphs are stated. With respect to the first three sub-paragraphs a correction of this statement is now required. The plaintiff submits that the presentation of these subjects by the Government's attorney is simply his arguments for the sake of presenting arguments. As indicated in this brief the plaintiff had previously furnished answers to these arguments. Further, the plaintiff's brief stated that a rehearing he should be given the opportunity to answer the Government's positions on separation for cause, courts are not in the promotion business, support of alleged bias by his reporting official, and two discriminatory procedures which are in violation of the fourteenth article of the US constitution.

The US Court of Claims ruled on December 21, 1976 that the plaintiff's petition for rehearing was allowed. On January 7, 1977 the US Court of Claims dismissed the plaintiff's petition for rehearing.

The plaintiff submits the following information in order to complete this incomplete court file.

c. Answer to the Government's contention that the plaintiff was separated for cause. The Government's attorney must be referring to AFR 36-11, paragraph 21, dated October 21, 1974. This written directive is a "selection out" procedure. No other "selection out" procedure exists for an Air Force Reserve officer not serving of EAD. On February 9, 1977 the plaintiff wrote to the Officer Promotion Section, HQ Air Force Military Personnel Center, Randolph AFB, Texas, and asked if this requirement was in effect in 1969 and 1970. The plaintiff has received a letter from this HQ dated March 3, 1977 which states that this requirement was not in effect prior to October 10, 1974. I submit that the Government's attorney is trying to contend that a written directive for an adverse action towards the plaintiff was in effect when reasearch discloses that this written directive did not exist at the time the plaintiff was considered by two officer selection boards. The Government's attorney is wrong on this matter.

d. Answer to the Government's contention that courts are not in the promotion business. Research of court reporters discloses that courts have ordered the promotion of a commissioned officer. The plaintiff cites Coddington v. U.S., 178 F. Supp. 604, 147 Cr. Cl. 629. The plaintiff believes that his citation of other leagal precidents for a court ordered promotion of a commissioned officer is unnecessary.

e. Support of alleged bias by the plaintiff's reporting official. The plaintiff offers the following direct testimony.

(1) The plaintiff's reporting official from November, 1966 to August, 1971 was the Comptroller. Excluding the Comptroller and the plaintiff there were four other officers assigned to this office. The Comptroller always invited the other officers and excluded the plaintiff to accompany him to the Officers Club for lunch and drinks after working hours.

(2) In 1969 an official from HQ 12th Air Force visited the plaintiff's Air Force Reserve Unit. The Comptroller called all the other assigned officers together except the plaintiff for a conference with this visiting officer. After the plaintiff ascertained the nature of this conference he sat in on this conference. The visiting officer eventually asked the plaintiff to explain to him the nature of his duty station performance of duties.

(3) The plaintiff's Air Foce Reserve unit sent its Comptroller Personnel to a regular Air Force Base during the annual encampment every second year in 1967, 1969, and 1971. The Air Force Reserve unit personnel worked with their active duty counterparts in order to learn their jobs. The Comptroller always visited the work locations of the Air Force Reserve Comptroller personnel during the annual encampment. The plaintiff would call the personnel in the room to attention when the Comptroller entered the room. The Comptroller would ignore the plaintiff, the ranking officer present, and ask a Noncommissioned officer or a civilian to escort him through this work area.

(4) During the 1971 annual encampment the plaintiff and five other Comptroller personnel remained at home duty station for the first six days on special assignment before departing to the regular Air Force Base annual encampment site by military aircraft. The plaintiff's unit commander informed him that the Comptroller would meet the arriving aircraft and make arrangements for transportation to and for billeting of the arriving Comptroller personnel. Upon arrival at the Air Force Base on a Friday evening no arrangements had been made for the arriving personnel and the Comptroller could not be located. The plaintiff, as ranking officer present, made the necessary arrangements for the arriving personnel. The plaintiff later learned the the Comptroller had left the Air Force Base for the weekend.

(5) The plaintiff's duty assignment in the Comptroller office was Management Analysis Officer. Whenever the Comptroller had work to be done by this section he always took the work to one of the two assigned Noncommissioned officers in this section and bi-passed the plaintiff in arranging for this work to be done.

(a) Alternative argument. The plaintiff's application for correction of records to the major command HQ correction board contains subjective matter of a personality conflict between the Comptroller and the plaintiff. While the plaintiff's application was pending at the major command HQ the applicable written directive for records correction was revised on February 18, 1970. The revised records correction written directive prescribes personality conflict. The plaintiff's major command HQ correction board reached its negative decision without applying the requirements of the revised written directive. If it is not ruled that the subject matter in the above sub-paragraphs comprise discriminatory acts then it must be argued that the above subject matter sub-paragraphs comprise a personality conflict between the plaintiff and his reporting official. The plaintiff submits that since February 18, 1970 that a personality conflict between the reporting official and the ratee is grounds to invalidate the OERs prepared by this reporting official. An extract copy of the paragraph pertaining to personality conflict from the revised correction board written directive is cited in the Regulations Involved section of this petition.

f. The subjects of (i) protracted delay in processing the plaintiff's application for correction of his records at his major command HQ and (ii) his reporting official's adverse military personnel discriminatory acts towards the plaintiff who is a a minority group member. The plaintiff questions both of these practices as being in violation of the fourteenth article of the US Constitution which prohibits discriminatory acts. The plaintiff has previously presented discussion of these subjects in this petition.

REASONS FOR GRANTING WRIT

The US Court of Claims according to its rule no. 13(e) can use discretion in considering matters before it. The plaintiff submits that this term is to be interpreted as "some" discretion instead of "wide" discretion. The plaintiff asks this honorable court to consider the following matters. This petition contains a description of how the US Court of Claims in dismissing the plaintiff's legal action before it did not:

a. Rule on two questions of constitutionality,

b. Rule on seven different legal issues,

c. Permit the plaintiff to answer all positions presented by the Government's attorney which caused the court to rule on an incomplete court file. The US Court of Claims rule no. 101c(2) requires the court file to be complete before it goes to trial.

The plaintiff specified in his legal petition before the US Court of Claims that this legal action was unique and requested a ruling on each and every legal issue presented. The US Court of Claims in dismissing the plaintiff's legal action ruled on only a few of the legal issues presented.

The plaintiff submits that the US Court of Claims has abused its discretion in denying the plaintiff's petition as is described above. The plaintiff relies upon the definitions of abuse of discretion and discretion which are found in Black's Law Dictionary, Revised Fourth edition, pages 24-25 and 553.

The Government's objection to the plaintiff's legal action is that an officer selection board decision is a discretionary one and cannot be reviewed by a court. The plaintiff must nonconcur with this position. The plaintiff cites Hankins v. U.S., 183 Ct. Cl. 32 as a legal precident of a court reviewing an Armed Service discretionary decision.

The plaintiff cites the following legal precident for US Court of Claims review of an Armed Service correction board decision adverse to claimant for errors of law and to see whether it is supportable by substantial evidence: Bridgeman v. U.S., 399 F. 2d 186, 185 Ct. Cl. 133.

CONCLUSION

This honorable court should:

a. Rule on the questions of constitutionality then issue a writ of mandamus to specify that the US Court of Claims is required to rule on each and every legal issue presented, then remand to this court for trial, or

b. Not rule on the questions of constitutionality but issue a writ of mandamus and remand for trial as specified in sub-paragraph a above.

For the forgoing reasons this petition for a writ of certorari should be granted.

Respectfully submitted,

Charles L. Meyer

Charles L. Meyer
Petitioner.

April 1, 1977

IN THE UNITED STATES COURT OF CLAIMS

No. 182-75

Charles L. Meyer v. The United States

Charles L. Meyer, Pro se.

Michael J. Rubin, with whom was Assistant Attorney General Rex E. Lee, for defendant.

Before SKELTON, Judge, Presiding, NICHOLS and KASHIWA, Judges.

ORDER

This case comes before the court on plaintiff's motion for summary and defendant's cross-motion for summary judgment. After a thorough reading of the briefs, consideration of the pleadings, and without oral argument, we grant defendant's cross-motion for summary judgment, deny plaintiff's motion for summary judgment, and dismiss plaintiff's petition.

Plaintiff is a former captain in the United States Air Force Ready Reserve who was separated from that service on August 26, 1971, after having been twice passed over for promotion to major. Plaintiff alleged that he was not selected for promotion to major due to administrative errors in his Officer Effectiveness Reports (OERs). He alleges that these errors violated certain Air Force Regulations.

After being notified of his nonselection for promotion to major in January, 1969, plaintiff reviewed his personnel records at the Air Reserve Personnel Center in Denver, Colorado. He claims that he then noticed for the first time certain alleged administrative errors in his OERs. His name was incorrectly spelled on one; the incorrect reporting official prepared two; and there were material misstatements and pertinent omissions on the remaining two.

In October 1969, plaintiff filed an application with the Officer Personnel Record Review Board (OPRRB), requesting the invalidation of the five OERs in question. That Board denied his application in April 1970.

In January 1970, plaintiff again failed to be selected for promotion. He submitted an application in June 1970, to the Air Force Board for the Correction of Military Records (AFBCMR). Again plaintiff's application was denied due to insufficient evidence to establish a showing of probable error or injustice. Although plaintiff requested a hearing, the Board, pursuant to AFR 31-3, denied the request and denied his application on June 22, 1971.

Plaintiff sought legal relief through the United States District Court for the Northern District of Illinois in August 1971. After that court dismissed the complaint for lack of jurisdiction in January, 1972, plaintiff appealed tot eh Seventh Circuit Court of Appeals, which affirmed the decision of the District Court on June 23, 1973. The Supreme Court denied a petition for writ of certiorari in December, 1973. Plaintiff filed the instant action in this court on June 2, 1975.

It is now well-established that this court will not review internal military personnel matters. Promotions are a matter of discretion with the military, and the courts are not in the promotion business. Orloff v. Willoughby, 345 U.S. 83 (1953); Brenner v. United States, 202 Ct. Cl. 678 (1973), cert. denied, 419 U. S. 831 (1974).

Moreover, the plaintiff's claim has been denied by the Air Force Board for the Correction of Military Records. There is a substantial body of law to the effect that a court cannot overturn a decision of the BCMR unless it is affirmatively shown by cogent and clearly convincing evidence to be arbitrary, capricious, and not based upon substantial evidence, or is contrary to applicable law and regulations. Since there is a strong presumption that the Board of Secretary (who must approve the action of the Board) faithfully discharged their duties, plaintiff has the burden of proving otherwise. See Cooper v. United States, 203 Ct. Cl. 300, 304 (1973); Dorl v. United States, 200 Ct. Cl. 626, 633, cert. denied, 414 U.S. 1032 (1973), Callan v. United States, 196 Ct. Cl. 392, 450 F. 2d

1121 (1971); Biddle v. United States, 186 Ct. Cl. 87 (1968). Plaintiff has not submitted cogent and clearly convincing evidence that the decision of the AFBCMR was arbitrary or capricious. The vague and ambiguous conclusionary statements offered by plaintiff do not qualify as such evidence.

This court has also held that the action in refusing to grant a hearing is neither arbitrary nor contrary to law and that, in the absence of a clear showing that the Board acted arbitrarily or capriciously, and therefore, unlawfully, its decision will not be disturbed. See Boland v. United States, 169 Ct. Cl. 145 (1965) and Kurfess v. United States, 169 Ct. Cl. 486 (1965).

For the foregoing reasons, IT IS ORDERED that the defendant's cross-motion for summary judgment is granted, plaintiff's motion for summary judgment denied, and the plaintiff's petition is dismissed.

BY THE COURT

Byron Skelton
Judge

November 12, 1976

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388 F. 2d 557, 563 (D.C. Cir. 1967)

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Winberg v. U.S. ,
98 Fed. Supp. 325, 120 Ct. Cl. 511

Winter v. U.S.,
89 S. Ct. 57 21 L.Ed. 2d 80 (1968)

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* The cited page numbers refer to cases cited in this petition. All cited cases except Bridgman v. U.S., Coddington v. U.S., and Hankins v. U.S. are cited from the legal action which is being appealed, US Court of Claims file no. 182-75.

OTHER PUBLIC LAWS

10 US Code, Sections 1006a, 1331, and 1552.

US Court of Claims, rule number 13(c), 13(e), 101c(2), and 151a.
US Constitution, Ammendments Nos. 5 and 14.

TEXT BOOKS

Black's Law Dictionary, Revised Fourth Edition, pages 24-25 and 553.

AIR FORCE REGULATIONS INVOLVED

Air Force Manual (AFM) 35-3 in effect in 1969 and 1970.

AFM 36-10 in effect in 1969 and 1970. Individual page numbers and paragraphs are specified in the plaintiff's petition filed June 2, 1975, Attachment No. 4.

AFR 31-3, dated 21 October 1970.

AFR 31-11 dated 29 April 1969, paragraphs 1, 3a, and 5b(2)(b).

AFR 31-11 dated 18 February 1970, paragraphs 1, 5b(2)(b), Attachment #2, paragraphs 1, 2a, 2b, and paragraph 11, cited below.

11. Appeals Based on Personality Conflict. Since the subordinate must abide by the superior's decisions, even though some disagreements may occur, the former must be able to rather conclusively document why the superior was unable to be objective during the evaluation process. Supporting statements must cite specific instances, observed on a first-hand basis, which indicate the superior/subordinate relationship became so strained that an objective evaluation of the individual's performance was not possible.

AFR 36-11, paragraph 21, dated 10 October 1974.

No. 76-1373

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHARLES L. MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1373

CHARLES L. MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges a determination by the Air Force Board for the Correction of Military Records not to correct alleged errors in certain of his Officer Effectiveness Reports (OERs). The Court of Claims denied him relief on this claim on November 12, 1976 (Pet. App.), and denied his petition for rehearing on January 7, 1977.

Petitioner is a former Captain in the United States Air Force Ready Reserve. He was separated from the service on August 26, 1971, after having twice been passed over for promotion to the rank of Major. The essence of his contentions here is that he was not selected for promotion

due to administrative errors made on his Officer Effectiveness Reports (OERs) and because he is a member of a minority group (Pet. App.).[1]

After being passed over for promotion in January 1969, petitioner filed an application with the Officer Personnel Record Review Board requesting invalidation of five OERs because of certain administrative errors such as the misspelling of his name. The Review Board denied the application in April 1970 (Pet. App.).

In June 1970, after again being passed over for promotion, petitioner applied to the Air Force Board for the Correction of Military Records. This application was denied because of insufficient evidence to establish error or probable injustice (Pet. App.).

In August 1971, petitioner brought an action in the United States District Court for the Northern District of Illinois to challenge the Board's denial of relief. The district court dismissed his complaint for lack of jurisdiction. The United States Court of Appeals for the Seventh Circuit affirmed (478 F. 2d 1406), and this Court denied certiorari (414 U.S. 1093).

The instant action was commenced in the Court of Claims in June 1975. The court granted summary judgment for the government and dismissed the case (Pet. App.).

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[1]Petitioner does not indicate in his petition to what minority group he claims membership; however, an affidavit in the record of this case discloses that he is Jewish. Petitioner apparently did not pursue administrative avenues available to him for the resolution of his discrimination claim. See 29 Fed. Reg. 13968, 13970.

The judgment below is correct. As the Court of Claims stated, relying on decisions of this Court (Pet. App.):

> Promotions are a matter of discretion with the military, and the courts are not in the promotion business. *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Brenner* v. *United States*, 202 Ct. Cl. 678 (1973), *cert. denied*, 419 U.S. 831 (1974).

A court cannot overturn a decision of the Board for Correction of Military Records concerning a promotion unless cogent and clearly convincing evidence is adduced to demonstrate that the Board's decision is arbitrary or capricious, or is not based on substantial evidence, or is contrary to applicable law or regulations. *E.g.*, *Dorl* v. *United States*, 200 Ct. Cl. 626, 633, certiorari denied, 414 U.S. 1032; *Cooper* v. *United States*, 203 Ct. Cl. 300, 304. Petitioner has made no such showing. As the Court of Claims noted, petitioner's contentions rest principally on certain alleged technical errors in his OERs, which the Board found to be non-prejudicial; disputes over such minor housekeeping matters do not justify judicial interference with a military personnel decision. *Pauls* v. *Secretary of the Air Force*, 457 F. 2d 294, 298 (C.A. 1).

Nor has petitioner shown an infringement of his constitutional rights. As the court of appeals stated in *Pauls* v. *Secretary of the Air Force*, *supra*, 457 F. 2d at 297:

> It is well-established law that military officers serve at the pleasure of the President and have no constitutional right to be promoted or retained in service and that the services of an officer may be terminated with or without reason. Reaves v. Ainsworth, 219 U.S. 296 * * *; Orloff v. Willoughby, 345 U.S. 83, 93-94 * * *; Cortright v. Resor, 2 Cir., 447 F. 2d 245, 253-254; Arnheiter v. Chafee, 9 Cir., 435 F. 2d 691;

Muldonian v. United States, 432 F. 2d 443, 447, 193 Ct. Cl. 99; Payson v. Franke, 108 U.S. App. D.C. 368, 282 F. 2d 851, 854.

Moreover, petitioner has failed to show that his claim of discrimination has substance, and absent such a showing the claim does not warrant further review.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.

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[2]Petitioner's contention that the Court of Claims erred in not giving explicit consideration to all of his claims also is insubstantial. The court stated that it gave "thorough" consideration to the briefs and pleadings before ruling in the case. The court was not required to give a detailed explanation of its decision, and its summary disposition does not show that it did not properly consider the case.